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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1947

No. 209

CROWELL-COLLIER PUBLISHING COMPANY
a Delaware Corporation,
Petitioner,

versus

MILLARD F. CALDWELL,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinion delivered by United States Circuit Court of Appeals—Fifth Circuit
See Appendix

I.

JURISDICTION

The jurisdiction of this court was invoked by virtue of Section 240 (a) of the Judicial Code (28 U.S.C. Sec. 347 (a)).

II.

STATEMENT OF THE CASE

Because of the failure of petitioner to set forth in its brief a statement of the case, and the serious omissions of many material facts from the statement contained in its petition for writ of certiorari, we have found it necessary to make a complete statement of the case as set forth below.

On or about the 10th day of October, 1945, one Jesse James Payne, a Negro man under indictment for attempted rape, was placed in the county jail at Madison, Florida, to await trial. On a morning shortly thereafter, the dead body of the said Jesse James Payne was found on the side of a road in Madison County. A grand jury investigation revealed that the deceased had been taken from the unguarded jail in which he was incarcerated, by a person or persons unknown, some time during the night previous to the morning on which his body was found. After being shot to death, Payne's body had been left along the side of the road, where it was later discovered.

On December 28, 1945, Governor Millard Caldwell of Florida, made a written reply to an inquiry by one R. B. Eleazer, of the General Board of Education of Methodist Church, concerning this matter (R. 18). This reply quoted verbatim the press release previously made by Governor Caldwell at the conclusion of the grand jury investigation, in which he severely censured the sheriff of Madison County for his negligence, stupidity and ineptitude in failing to properly protect the prisoner. The Governor further commented that he did not consider the incident a lynching, since an investigation did not indicate that the deceased had been taken from the jail by an individual or by two or more persons acting in concert. The Governor further observed that the ordeal of bringing a young and innocent victim of rape into open court and subjecting her to detailed cross-examination by counsel could easily be as great an injury as the original crime, and speculated that this probably accounts for a number of lynchings or killings which otherwise might be avoided, and that society has not found a solution to this problem (R. 19).

Prior to February 13, 1946, Governor Caldwell learned that the petitioner, Crowell-Collier Publishing Company,

had prepared for publication an editorial to be printed in its February 23, 1946, issue of Collier's magazine, and had distributed to various newspapers throughout the United States advance proofs of such editorial, in an apparent effort to increase the magazine's circulation by calling the attention of the public to the fact that the editorial would be published as aforesaid (R. 6). The editorial states, as a matter of fact, that a Negro in Florida under indictment for attempted rape was snatched from jail by a mob and shot to death; that Governor Millard Caldwell of Florida did not consider this a lynching, but went on to opine that the mob had saved the courts considerable trouble (R. 5). Upon learning of the intention of petitioner to print, publish and distribute said editorial in its February 23d issue of Collier's magazine, the respondent transmitted a telegraphic notice to petitioner on the 13th day of February, 1946, ten days in advance of the publication date referred to, in which he charged that the editorial contained false, libelous and damaging statements, and requested that the advance proofs be withdrawn and that the petitioner refrain from publishing said editorial (R. 6, 7). Despite the warning and admonition from the respondent and his notice in writing of the article he alleged to be false and defamatory, the petitioner proceeded to and did print, publish and distribute throughout the United States, the State of Florida and the Northern District of Florida, the editorial above mentioned, in which it is stated by inescapable inference that the respondent, both individually and as Chief Executive of the State of Florida, condoned the commission of an admittedly unlawful act and approved mob rule, contrary to his oath of office and every conception of good government, law and justice (R. 7). By letter dated February 27, 1946, the respondent again notified the petitioner in writing that the editorial appearing in the February 23d issue of its Collier's magazine was false, defama-

tory and damaging and that suit for the recovery of appropriate damages would be immediately instituted (R. 15). No apology or retraction was published by petitioner prior to the filing of the complaint in this suit on the 20th day of March, 1946 (R. 12), nor has any such apology or retraction since been published (R. 12).

To the complaint the petitioner filed its motion to dismiss (R. 23), which admitted the falsity of the article and which was granted by order of the District Court dated June 14, 1946 (R. 29), on the stated grounds that the complaint does not state a case of libel per se; that no special damages are alleged to support an action of libel per quod, and that the publication is privileged. The respondent, Millard F. Caldwell, took an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, where the order of the District Court was reversed and the cause remanded for further proceedings consistent with the court's opinion (R. 29, 32). For the convenience of the court, the said opinion is herein set out in the appendix. It is this ruling of the United States Circuit Court of Appeals for the Fifth Circuit that the petitioner, Crowell-Collier Publishing Company, seeks to have this honorable court review by a writ of certiorari.

III.

SUMMARY OF ARGUMENT

Point 1. A publication which falsely charges that the Governor of a sovereign state publicly approved the mob lynching of a Negro man charged with attempted rape, by having said that the mob had saved the courts, etc., considerable trouble, exposes such Governor to distrust, hatred, contempt, ridicule and obloquy, and has a tendency to injure him in his office, thereby constituting a libel per se.

BRIGGS v. MERTON & BROWN, 55 Fla. 417, 46 So. 325;
McCLELLAN v. L'ENGLE, 74 Fla. 581, 77 So. 270;
McCRARY v. POST PUBLISHING COMPANY, 109 Fla. 93, 147 So. 259;
TIP-TOP GROCERY COMPANY v. WELLNER, 130 Fla. 270, 177 So. 735.

Point 2. If the direct imputation drawn from a publication holds a Governor up as being indifferent to a lynching in his state, or as condoning it, and as approving the work of a mob as saving trouble for the courts, such publication grievously reflects on him in his office and, if false, is actionable per se, injury and damage being implied. This is so for the reason that, as Governor, he took an oath of office to uphold the constitution of his state, which requires that he see that the laws are faithfully executed, which laws guarantee to every person accused of crime a speedy and public trial by impartial jury and subjects the Governor to impeachment for the commission of a misdemeanor in office.

STATE v. BROWSKY, 11 Nev. 119;
STATE v. HASTINGS, 38 Neb. 584, 56 N. W. 774.

Point 3. The language of a publication should be construed as the common mind would naturally understand it, and it is not necessary that the false charge be made in a direct manner, if the words in their ordinary meaning convey it. An insinuation is as actionable as a positive assertion, if the meaning is plain.

33 AMER. JURIS.—Libel and Slander, Par. 9;
McCLELLAN v. L'ENGLE, 74 Fla. 581, 77 So. 270.

Point 4. Although fair and honest criticism of the conduct of a public officer is not libelous, the mere fact that he

is a public officer does not constitute a warrant to spread false charges against him of criminal acts or disgraceful conduct, and the qualified privilege extended to publications does not protect a false statement of fact or an unjustifiable inference. The privilege ends when falsity begins.

NEVADA STATE JOURNAL PUBLISHING CO. v. HENDERSON, (1923; C.C.A. 9th) 294 Fed. 60, 264 U. S. 591, 68 L. Ed. 865, 44 Sup. Ct. 404;
CORTRIGHT v. ANDERSON (1924), 208 App. Div. 1, 202 N.Y.S. 729;
JONES, VARNUM & COMPANY v. TOWNSEND, 21 Fla. 431, 58 Am. Rep. 676;
GRAHAM v. STAR PUBLISHING COMPANY (1925), 133 Wash. 387, 233 Pac. 225.

Point 5. Where a complaint properly alleges malice in fact in connection with a false publication, the question of privilege becomes immaterial, as it is no excuse for malice.

ABRAHAM v. BALDWIN, 52 Fla. 151, 42 So. 591;
COOGLER v. RHODES, 38 Fla. 240, 21 So. 109.

Point 6. The rule which protects a newspaper against liability for false statements contained in an Associated Press or wire service dispatch published by it, does not apply to a deliberate magazine editorial containing false, damaging and libelous statements made on the editor's own responsibility, particularly when the editor is notified ten days in advance of the date on which the publication is made, that such editorial is false and a request to not publish the same is made.

LAYNE v. TRIBUNE COMPANY, 108 Fla. 177, 146 So. 234.

Point 7. Section 770.02 of the Florida Statutes, permitting a defendant in an action of libel to avoid liability for punitive damages by publishing a correction, apology or retraction, was enacted for the benefit of the publisher of any alleged libel, and he cannot escape liability for punitive damages, after failing to publish an apology or retraction, on the excuse that the person libeled stated in his second written notice that he would not accept an apology or retraction as satisfaction for the damages suffered.

METROPOLIS COMPANY v. CROASDALE, 145 Fla. 455, 199 So. 568.

IV.

ARGUMENT

POINT 1

The publication complained about stated in part as follows:

> "In Florida a few months ago, a Negro under indictment for attempted rape was snatched from jail by a mob and shot to death. Governor Millard Caldwell of Florida said he didn't consider this a lynching. *He went on to opine that the mob had saved courts, etc., considerable trouble* * * * "
>
> (Italics supplied)

(R.5). The above quoted statement purports to be a direct quotation from a statement made by Governor Caldwell of Florida, and is wholly false in every respect, which falsity is admitted by petitioner's motion to dismiss, the order on which is here for review. The statement implies that the Governor holds Payne's death at the hands of a mob was justified, in view of the crime he is alleged to have

committed, which philosophy is contrary to every concept of justice and democratic government. Such statement, if believed, would create within the mind of an average man hatred, contempt and ridicule of Governor Caldwell. Embodied, as it is, in an editorial which lauds and praises the Governor of another southern state for his action in dealing with a similar social problem (R. 5), it can have no effect other than to injure Governor Caldwell in his office.

In holding that such publication is libelous per se, the Circuit Court of Appeals for the Fifth Circuit followed the rule expressed many times by the Supreme Court of Florida.

In the case of McCLELLAN v. L'ENGLE, 74 Fla. 581, 77 So. 270, a member of the United States House of Representatives sued for libel on account of a newspaper publication in which the plaintiff was depicted as a clown and grandstand player, and in which it was said that he had done nothing for Florida since he was sent to Washington and was unable to vote intelligently in a House caucus. In applying the law to the publication complained of, the court said:

> "(1) A civil action for libel will lie when there has been a false and unprivileged publication which exposes a person to distrust, hatred, contempt, ridicule, or obloquy, or which causes such person to be avoided, or which has a tendency to injure such person in his office, occupation, business, or employment. If the publication is false and not privileged, and is such that its natural and proximate consequence necessarily causes injury to a person in his personal, social, official, or business relations of life, wrong and injury are presumed or implied and such publication is actionable per se. * * *

"(2) The language of a publication alleged to be libelous should be construed as the common mind would naturally understand it. Jones, Varnum & Co. v. Townsend's Administratrix, 21 Fla. 431, 58 Am. Rep. 676.

" * * * 'A libelous publication falsely and maliciously made is not privileged. The protection of the privilege may be lost by the manner of its exercise, though the belief in the truth of the charge exist.' Jones, Varnum & Co. v. Townsend's Administratrix, 21 Fla. 431, text. 456, 58 Am. Rep. 676; Abraham v. Baldwin, 52 Fla. 151, 42 South. 591, 10 L.R.A. (N.S.) 1051, 10 Ann. Cas. 1148."

In the case of METROPOLIS COMPANY v. CROASDALE, 145 Fla. 455, 199 So. 568, a public official sued in libel on account of a publication charging that he had been "cashiered" out of his job with the county of his residence. In holding that the effect of the publication was to charge *by imputation* that the plaintiff had been dismissed from his job with dishonor or in disgrace, and that the publication was, therefore libelous, the Supreme Court of Florida said:

> "Libel per se is false and unprivileged publication of unfounded statements which tend to injure a person in office, occupation, business, or employment and which in natural and proximate consequence will necessarily cause injury. * * * "

To the same effect are the rulings of the Supreme Court of Florida, in the cases of BRIGGS v. MERTON & BROWN, 55 Fla. 417, 46 So. 325; McCRARY v. POST PUBLISHING COMPANY, 109 Fla. 93, 147 So. 259; TIP-TOP GROCERY COMPANY v. WELLNER, 130 Fla. 270, 177 So. 735; LAND v. TAMPA TIMES PUBLISHING COMPANY, 68 Fla. 546, 67 So. 130.

The case of PENNYKAMP v. FLORIDA, 90 L. Ed. 1295, 328 U. S. 331, involved a conviction on a citation for contempt of court. Petitioner has quoted freely from this case, using the language expressed therein as justification for the libel committed against the respondent. Such language, however, was used by this court in deciding one issue, and one issue alone, namely: "whether or not the publication complained of presented a clear and present danger of high imminence to the administration of justice by the court or judges who were criticized." Although this court held that the publication complained of did not constitute a clear and present danger of high imminence to the administration of justice, when construed in the light of the constitutional provision relied upon, it did hold:

> "Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings. For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants."

This court, therefore, recognized that, although false statements criticizing public officials and holding them up to ridicule, contempt, disgrace and obloquy, might not be sufficient to sustain a conviction of contempt of court, the person injured still has his remedy in a suit of libel for damages against the author of the libelous publication.

POINT 2

The editorial complained about (R. 5), when read in its entirety, was calculated to depict Governor Caldwell as representing that type of backward and discredited Southern official who has no regard for minority races, nor a desire to see that they receive the full protection of the law. The inescapable imputations and inferences naturally

drawn from the publication hold the Governor up as indifferent to a lynching in his state, or condoning it, and as having approved the work of the mob as saving the courts trouble.

The Florida Constitution, Section 6, Article IV, imposes upon the Governor the sworn duty of seeing that the laws are faithfully executed.

Section 11 of the Declaration of Rights, contained in the Florida Constitution, guarantees to every person accused of a crime the right to a speedy and impartial trial by an impartial jury.

Section 29, Article III, of the Constitution of Florida, provides that the Governor shall be liable to impeachment for any misdemeanor in office.

The use of the phrase, "misdemeanor in office," contained in the above mentioned section of the Florida Constitution, used in its proper sense, means "misconduct" and does not necessarily refer to a technical misdemeanor, which is a species of crime.

STATE v. HASTINGS, 38 Neb. 584, 55 N. W. 774;
STATE v. BROWSKY, 11 Nev. 119.

If it were true that the Governor had in fact condoned a mob lynching and approved the work of a mob, in killing a man who had merely been accused of committing a crime, under the pretext that such killing had saved the courts trouble, he would certainly be guilty of misconduct or a misdemeanor in office and subject to impeachment by the proper forum of government.

In the case of COTULLA v. KERR, 74 Tex. 89, 11 S. W.

1058, 15 Am. St. Rep. 819, the Supreme Court of Texas said that if a libelous publication applies to a person as an officer, the better opinion seems to be that, to make it actionable per se, the charge must be of such nature which, if true, would be cause for his removal from office. Further commenting, the court said:

"Thus, the erection and display of a large signboard warning people against passing through a certain county, since the district attorney (who was entitled to certain fees upon conviction of persons of penal offenses) was a 'fee grabber' was held, in Smith v. Pure Oil Co. (1939) 278 Ky. 430, 128 S. W. (2d) 931, to be libelous per se, if false, and so not privileged.

"Thus, a direct charge of official misconduct is not comment or criticism, and, if the charge is false, is not privileged. Lindsey v. Evening Journal Asso. (1932) 10 N. J. Mis. R. 1275, 153 A. 245, holding that a publication that plaintiff (employed as a clerk in the county board of elections) was caught in the act of disfranchising the voters of a certain city because they did not bow the knees to a named individual was not a mere comment or criticism, but a direct charge of a particular act of misconduct, and, if not true, would not be privileged even if made without malice. The court declared: 'There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press but by all members of the public. But the distinction cannot be too clearly borne in mind between comment and criticism, and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticize, even with severity, the acknowledged or proven acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. It is settled that newspapers as such have no peculiar privilege, and it is equally settled that the privilege of comment and criticism on matters of public interest does not extend to false statements.'

"An article in the defendant's newspaper reciting that there had been a severe storm in a certain vicinity, that it was the duty of the members of the levee board to take necessary steps for the protection of persons and property in that vicinity, that notwithstanding this, members of the board were derelict in their duty, failing to act in the emergency, and that the plaintiff, one of the members of the board, had left the scene of danger, with his family, and gone to New Orleans, was held, in Cadro v. Plaquemines Gazette (1942) 202 La. 1, 11 So. (2) 10, to be of a defamatory nature, and it was further held that if the statements were untrue, the doctrine of privilege or fair comment was inapplicable."

It cannot be doubted but that the statements contained in the publication of the petitioner, if true, would warrant the respondent's impeachment.

POINT 3

Petitioner attempts to take refuge in the position that the words used in the editorial complained about could be considered libelous only by implication or imputation, and not as a result of any direct charge of misconduct against the respondent. This position is not sustained by the record. However, in considering whether or not the publication is libelous per se, the language must be construed as the common mind would naturally understand it. It is not necessary that the admittedly false charge be made in a direct manner if the words in their ordinary meaning convey the imputation of misconduct in office. An insinuation is as actionable as a positive assertion, if the meaning is plain. The inescapable conclusion reached by the average mind of a person reading the editorial complained about, both from direct statements made and by imputations and inferences drawn from such statements, is that Governor Caldwell condoned the mob lynching of a Negro man charged with rape and expressed the conviction that the

lynching had saved the courts of Florida considerable trouble. The admitted utter falsity of the statements contained in the editorial, as well as the imputations and implications drawn therefrom, was ably expressed by Judge Samuel Sibley, of the Court of Appeals, in this case, (Appendix 28), when he said:

> "We have compared the picture made by the editorial (R. 5) with that presented by the public statement by the Governor included in the letter from which an excerpt was quoted. (R. 8). One picture is almost the reverse of the other. The quotation is a correct one in itself, but the letter as a whole shows that so far from condoning lynching in general or this killing in particular which the Governor did not think properly to be called a lynching since no mob apparently was involved, he strongly censured the sheriff for stupidity and ineptitude, but did not feel justified in removing him, and warned all officers against any future laxness. * * * "
>
> (Parentheses supplied)

33 Am. Juris.—Libel and Slander, Par. 9
McCLELLAN v. L'ENGLE, 74 Fla. 581, 77 So. 270.

POINT 4

We subscribe to the doctrine that in our form of democracy, freedom of speech and freedom of the press must be accorded the full right to fairly and honestly criticize the conduct of public officers. To do otherwise would promote corruption and bad government. So long as the statements made are true, the official record and statements of public officials may be criticized and condemned. Freedom of speech and freedom of the press, however, cannot be used as an effective cloak against liability for false statements or perverted facts attributed to public officials, nor do they protect against unjustifiable inferences. The qualified privilege accorded newspapers and magazines in comment-

ing upon the acts, statements and records of public officials ends where falsity begins.

In the case of NEVADA STATE JOURNAL PUBLISHING COMPANY v. HENDERSON, 294 Fed. 60, the Circuit Court of Appeals for the Ninth Circuit, correctly stated the law of libel to be as follows:

> "The publication of defamatory matter admittedly false, without inquiry or investigation to ascertain the truth of the charges before publication, and the refusal to retract after publication, held to warrant a finding of actual malice, and the imposition of exemplary damages by the jury. Privilege does not extend to publication of untrue statements of fact. Privilege in publications respecting a candidate for public office does not extend to the making of untrue statements of facts, or false charges of particular acts of criminality or disgraceful conduct."

The original Florida case on the question of privilege is JONES, VARNUM & COMPANY v. TOWNSEND'S ADMINISTRATRIX, 21 Fla. 431, 58 Am. Rep. 676. In this decision the court quoted with approval the law announced by the Supreme Court of the State of New York as follows:

> "In Hamilton v. Eno, 81 N. Y. 116, it is held that the official acts of a public functionary may be fully criticized and entire freedom of expression used in argument, sarcasm and ridicule upon the act itself, and that the occasion will excuse everything but actual malice and evil purpose in the critic; *but the occasion will not of itself excuse an attack upon the character and motive of the officer;* to excuse this the critic must show the truth of what he has uttered. To accuse one holding a public office of an offense is not privileged, and if the charge be false the utterer is liable, however good his motives, and this although the libel relate to

an act of the officer in discharge of his official duties."
(Italics supplied)

In the case of LEVERT v. DAILY STATES PUBLISHING COMPANY (1909), 123 La. 594, 49 So. 206, 23 L.R.A. (N.S.) 726, the Supreme Court of Louisiana said:

> "The privilege of fair and reasonable criticism of public men does not embrace the right to publish false statements of fact, or to falsely impute to them malfeasance or misconduct in office; *malice is conclusively established if the communications are false in fact.*"
> (Italics supplied)

To the same effect is WHEATON v. BEECHER (1887), 56 Mich. 307, 33 N. W. 503:

> "One may in good faith publish the truth concerning a public officer, but if what is stated is false or aspersive, he who publishes it is liable therefor, however good his motives."

In publishing the editorial complained of (R. 5), the publisher transcended the borders of fair and honest criticism of the respondent. It is common knowledge that the respondent Governor took an oath to faithfully execute the laws of his state, which guarantee to every person accused of crime a fair, speedy and impartial trial. The editorial complained about states, in effect, that the respondent had condoned the mob lynching of a man accused of crime for which he had not yet been tried. The conclusive inference is that the respondent thereby violated his oath of office and closed his eyes to a direct violation of the laws which he is sworn to faithfully execute. Such a statement of fact by petitioner, which is utterly false, cannot be considered privileged merely because the victim of the libel is a public official.

CORTRIGHT v. ANDERSON, 208 App. Div. 1, 202 N. Y. S. 729;
GRAHAM v. STAR PUBLISHING COMPANY (1925), 133 Wash. 387, 233 Pac. 225.

POINT 5

Petitioner attempts to excuse itself from liability for the false and libelous publication complained about on the ground that the statements come within the qualified privilege rule. Such rule of law has no application here, for the reason that express malice is alleged in the complaint in connection with the false publication complained about (R. 8, 12). Where express malice is alleged, privilege becomes immaterial, since privilege is no excuse for malice.

COOGLER v. RHODES, 38 Fla. 240, 21 So. 109;
ABRAHAM v. BALDWIN, 52 Fla. 151, 42 So. 591.

POINT 6

We recognize the rule stated by the Supreme Court of Florida, in the case of LAYNE v. TRIBUNE COMPANY, 108 Fla. 177, 146 So. 234, which protects a newspaper against liability for false statements contained in an Associated Press or a wire service dispatch published by it. The reason for this rule is obvious, and is fully explained by the court in its opinion. The editing and publishing of a daily newspaper does not permit verification of news dispatches emanating from different points over the world before publishing such dispatches in the newspaper.

This rule, however, has no application to the facts in this case. The publication complained about here is a deliberate magazine editorial containing false, damaging and libelous statements made on the editor's own responsibility. It was published in a weekly magazine where the time element to meet a publication date was not involved.

The record shows (R. 6) that due notice of the falsity of the statements contained in the editorial was communicated to the officials of the petitioner ten days before the date on which the article was published. Ample time was afforded to verify the incorrectness of the statements and to withhold the editorial if the petitioner had desired to do so. The reason for the rule in the LAYNE v. TRIBUNE COMPANY case, supra, is not present here, and the law stated by the court has no application to this case.

Petitioner seeks to excuse its libelous act on the ground that it was reprinting an article taken from Time Magazine, a recognized news-gathering agency. If the petitioner was justified in plagiarizing the Time article (R. 9, 10) which was published on January 7, 1946, Time Magazine admitted the incorrectness of its article and apologized (R. 10, 11). Such apology was made almost three weeks before the publication of the editorial complained about for which this suit was instituted. The court will judicially notice, however, that Time Magazine is not a news-gathering agency, but a copyrighted publication. Collier's not only did not have the right to lift the news story from it without the permission of Time, but it is confronted with the obvious proposition that Time Magazine is a news perodical that is distributed directly to the public, not to other publishers for republication. This is a matter of common knowledge, and if the court will examine any copy of Time Magazine, it will find this language:

> "Copyright. Time is Copyright in . . . . . , by TIME, INC. under International Copyright Convention. All Rights reserved under Pan American Copyright Convention.
>
> "The Associated Press is exclusively entitled to the use for republication of the local telegraphic and cable news published herein originated by Time, The Weekly

Newsmagazine or obtained from The Associated Press."

Thus Collier's has demonstrated not to have had the right in the first instance to take the news story from Time and quote it practically verbatim.

POINT 7

The record shows that the respondent served on the petitioner, ten days before publication of the article complained of (R. 16), and again served notice on petitioner, more than five days before the institution of this suit in the District Court, a notice in writing, specifying the article and the statement therein, which he alleged to be false and defamatory (R. 15). Each notice fully complied with all the requirements of Section 770.01, Florida Statutes, 1941, which provides as follows:

"770.01. Notice condition precedent to action or prosecution for libel.

"Before any civil action is brought for publication, in a newspaper or periodical, of a libel, the plaintiff shall, at least five days before instituting such action, serve notice in writing on defendant, specifying the article, and the statements therein, which he alleges to be false and defamatory."

If the petitioner had sought to avoid responsibility for punitive or exemplary damages, it was its privilege to do so, by publishing a correction, apology or retraction, in conformity with the requirements of Section 770.02, Florida Statutes, 1941, which reads as follows:

"770.02. Correction, apology or retraction by newspaper.

"If it appears upon the trial that said article was

published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages."

The record shows that no correction, retraction, or apology was published by the petitioner within the time required by law, nor has one since been published (R. 12).

Petitioner now seeks to avoid the responsibility for punitive damages under the pretext and excuse that it was relieved from this requirement by the statement made in respondent's second notice, in which respondent said that he could not accept a retraction or apology as satisfaction for the damages suffered (R. 23).

The first notice sent petitioner on February 13, 1946, ten days before the article was published, complied with all requirements of the applicable statute relative to notice. No contention is made by petitioner that this notice was insufficient. Nor is it contended that such notice contained any statements which would relieve petitioner from liability for punitive damages. Therefore, whether or not the second notice sent petitioner on February 27, 1946, was sufficient, becomes immaterial.

The statute permitting the publication of a retraction or an apology in avoidance of punitive damages was enacted for the sole use and benefit of the person publishing the libel. It was his privilege and right to take advantage

of the benefits conferred by said statute by publishing such apology or retraction, if he saw fit so to do. The statement by respondent in his second notice, that he would not accept a retraction or apology as satisfaction of the damages suffered, was not binding in any respect upon petitioner. It would have been fully within its rights to disregard such statement and protect itself against the imposition of punitive damages, if it had elected to do so. Petitioner elected, however, to stand upon its position that no libel had been committed through the publication of the editorial complained about, thereby running the risk of suffering the imposition of punitive damages in the event it was held that such editorial was in fact libelous and punitive damages were awarded. Petitioner cannot now be heard to complain that punitive damages should not be recovered merely because the respondent stated in his second notice that he would not accept an apology or retraction in satisfaction of the damages suffered. The purpose of the statute above mentioned, and the manner in which it was intended to operate in cases of this kind, was discussed by the Supreme Court of Florida, in the case of METROPOLIS COMPANY v. CROASDALE, 145 Fla. 455, 199 So. 568. There it was held that failure of a newspaper to print a retraction of a libelous article within ten days after receipt of statutory notice, is evidence of actual malice, which subjected the newspaper to the imposition of punitive damages. It is, therefore, mandatory upon the one publishing the libel likewise to publish a retraction within the statutory period, or else subject itself to the payment of punitive damages.

We submit that no further consideration of this question is necessary, because the record shows a strict compliance with the statute. However, if the court cares to examine the matter further, we submit that the statute itself is unconstitutional.

HALE AND BENSON, LAW OF THE PRESS, p. 69; Sections 1 and 4, DECLARATION OF RIGHTS, FLORIDA CONSTITUTION.

CONCLUSION

The judgment sought to be reviewed is in complete harmony and conforms with the decisions of this court, the decisions of other Circuit Courts of Appeal, and with the decisions of the Supreme Court of Florida. The Circuit Court of Appeals correctly applied the applicable law to the facts shown by the record to exist in this case, in holding that the complaint stated a case of libel per se, for which damages are recoverable.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari filed herein should be denied.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11798

MILLARD F. CALDWELL,
Appellant,

-vs-

CROWELL-COLLIER
PUBLISHING COMPANY,
Appellee.

Appeal from the District Court of the United States for the Northern District of Florida.
(April 21, 1947)

Before SIBLEY and LEE, Circuit Judges, and STRUM, District Judge.

SIBLEY, Circuit Judge: The appellant Millard F. Caldwell, a citizen of Florida, sued appellee Crowell-Collier Publishing Company, a corporation of Delaware, for a sum largely exceeding $3,000.00 for an alleged libel published Feb. 23, 1946, in the magazine called "Colliers" which was circulated throughout the State of Florida, the United States, and the world. The complaint was dismissed on motion, the district judge holding that it did not state a case of libel per se, that no special damages were alleged to sustain it as a libel per quod, and that it appeared that the publication complained of was privileged, The plaintiff appeals to this court.

The allegations, much condensed, are that Caldwell was and is the Governor of the State of Florida, that the publication complained of is an editorial as follows:

"Two Governors on Race Problems."

"About a year ago a fourteen year old negro broke into a Wilmington, North Carolina, house, raped a pregnant woman, was caught the next day, confessed, and was sentenced to death. Recently Governor Cherry of North Carolina commuted the colored boy to life imprisonment, remarking in part: 'The crimes are revolting, but a part of the blame arises from the neglect of the State and society to provide a better environment. . . . ' "

"In Florida a few months ago, a negro under indictment for attempted rape was snatched from jail by a mob and shot to death. Governor Millard Caldwell of Florida said he did not consider this a lynching. He went on to opine that the mob had saved courts, etc., considerable trouble, and added:

'The ordeal of bringing a young and innocent victim of rape into open court and subjecting her to detailed cross-examination could easily be as great an injury as the original crime. This fact probably accounts for a number of killings which might otherwise be avoided.'

"Thus Cherry of North Carolina expresses the forward-looking view of these matters, while Caldwell of Florida expresses the old narrow view which has been about as harmful to southern white people as to southern negroes. We can only congratulate North Carolina on its governor and hope that Florida may have similar gubernatorial good luck before long."

Further allegations are that it was not true that the negro was snatched from jail by a mob; that the statement that the Governor said he did not consider this a lynching was a distortion, imputing that the Governor did not disapprove the killing, while what he said was that it was murder, and not a lynching because there was no evidence of mob action; and that he "opined the mob had saved the courts considerable trouble" was wholly untrue; the direct

quotation was an isolated excerpt from a letter, the whole letter being exhibited, which quoted a public statement that a grand jury had investigated the killing, had failed to fix the guilt, but exonerated the sheriff; that the Governor had sent a special investigator who reported the sheriff did not participate in the crime; that the Governor thought nevertheless the sheriff by his stupidity and ineptitude had showed his unfitness for office, but he was duly elected by the people of the county and not subject to removal for this cause by the Governor, but the Governor now served notice on the officials of Florida that the highest degree of care would be expected; there followed an expression in the letter of the writer's personal opinion that the killing was not a lynching; and the reference to the ordeal of a trial as respects the young victim (said to have been a child of five years); and an expression of determination to awaken the citizens of the counties to feel responsible for the officials they elect; and an intention to stimulate the people to action and make democracy work.

Further allegations are that on February 13, 1946, the plaintiff learned of the editorial about to be printed, and he telegraphed the publisher, the editor, and the managing editor, calling attention to the false statements and inferences in the editorial and the damage it would do him, and requesting that it be not published, but nevertheless it was wickedly and maliciously published, intended to and having the effect of injuring him in his good name, fame, and creed, and bringing him into contempt and ridicule before the people of Florida and the United States. It is alleged that plaintiff was before his election as Governor a practicing attorney at law in general practice, that he had been active in politics, serving in the Legislature of Florida and in the Congress of the United States, that the editorial gave the impression that a lynching had occurred

in Florida while he was Governor, and that he had condoned it, and had approved the action of a mob in taking a negro from the protection of the law and killing him, to the great damage of the plaintiff's reputation both personal and professional, and that it was done for the purpose of casting contempt and ridicule upon plaintiff and discrediting him in the eyes of the public and the electorate, and that the editorial was calculated to create the impression that he had condoned and approved lax law enforcement and lynch law.

Lastly it is alleged that more than five days before suing plaintiff had in writing pointed out to defendant the editorial and the statements therein considered false and defamatory, and stated his intention to sue, as required by Florida statute, but no apology, retraction or correction has been made.

We think a case of libel is alleged. Publication is averred in Florida and throughout the United States, but the injury must have occurred mainly in Florida where the plaintiff resides and holds office, and the law of Florida is principally to be regarded. We observe, however, no substantial difference between the law of Florida and that of other common law States. A libel is a compound of written falsity and malicious publication, but the falsity may consist in untrue imputation as well as direct statement, and malice may be inferred from the nature of the charges made as well as from the circumstances. False imputations may be actionable per se, that is in themselves, or per quod, that is on allegation and proof of special damage. 33 Am. Jur., Libel and Slander, §5; Commander v. Pederson, 116 Fla. 148, 156 So. 337; Johnson v. Finance Acceptance Co., 118 Fla. 397, 159 So. 364. No special monetary or other damage is here alleged, so the question is, Are the false imputations libelous per se? Imputation of a

crime is not present. But it is enough, if the natural or necessary result of the imputation is to hold one up to public hatred, contempt or ridicule, 33 Am. Jur., Libel and Slander, §45; or to prejudice him in his profession, office, occupation or employment, Id. §63, and more particularly in his public office, §79. In Briggs v. Merton and Brown, 55 Fla. 417, 46 So. 325, the law is thus stated:

> "A civil action will lie when there has been a false and unprivileged publication by letter or otherwise which exposes a person to distrust, hatred, contempt, ridicule, or obloquy, or which has a tendency to injure such person in his office, occupation, business or employment. If the publication is false and not privileged, and is such that its natural and proximate consequence necessarily causes injury to a person in his personal, social, official, or business relations of life, wrong or injury are presumed and implied and such publication is actionable per se."

This is repeated in Land v. Tampa Times Pub. Co., 68 Fla. 546, 67 So. 130; McClelland v. L'Engle, 74 Fla. 581, 77 So. 270; McCrary v. Post Pub. Co., 109 Fla. 93, 147 So. 259; Tip Top Gro. Co., v. Wellner, ... Fla. ....., 199 So. 568. The imputations here do not appear to be such as would affect the plaintiff as an attorney, if he were now practicing, but they would naturally affect him in his office as Governor. The Florida Constitution, Art. IV, Sect. 6, imposes on the Governor the sworn duty of seeing that the laws are faithfully executed. Art. XVI, Sect. 2, prescribes the form of oath. The Declaration of Rights, Sect. 11, guarantees to every person accused of crime a speedy and public trial by an impartial jury. Art. III, Sect. 29, makes the Governor subject to impeachment for "misdemeanor in office". Misdemeanor in the constitutional sense means simply misconduct, not necessarily indictable. State v. Browsky, 11 Nev. 119; State v. Hast-

ings, 38 Neb. 584, 56 N. W. 774. If the imputations published hold the Governor up as indifferent to a lynching in his State, or condoning it, and approving the work of the mob as saving trouble to the courts, they greviously reflect on him in his office, and if false and unprivileged are actionable per se, injury and damage being implied.

We have compared the picture made by the editorial with that presented by the public statement by the Governor included in the letter from which an excerpt was quoted. One picture is almost the reverse of the other. The quotation is a correct one in itself, but the letter as a whole shows that so far from condoning lynching in general or this killing in particular which the Governor did not think properly to be called a lynching since no mob apparently was involved, he strongly censured the sheriff for stupidity and ineptitude, but did not feel justified in removing him, and warned all officers against any future laxness. It is not necessary that the false charge be made in a direct manner, if the words in their ordinary meaning convey it, and an insinuation is as actionable as a positive assertion if the meaning is plain. 33 Am. Jur., Libel and Slander §9. A jury might well conclude that the Governor was being held up as unfaithful to his office by reason of facts falsely stated and implied in the editorial.

But it is argued by appellee that what "Colliers" published is a substantial reproduction of what it is alleged the magazine "Time" had said in its issue of Jan. 7, and that a newspaper may reproduce without liability news from a reliable source which cannot well be verified. Layne v. Tribune Co., 108 Fla. 177, 146 So. 234. The Layne case had to do with an Associated Press news item in a daily paper. Here we have a deliberate magazine editorial, made on the editor's own responsibility. If he relied on "Time",

it is also alleged that "Time", when its attention was called to the incorrectness of its publication, had on Feb. 4 published a full retraction and apology, of which the editor of "Colliers" could easily have known.

More broadly, it is argued that since the publication related to a public officer and was by the public press, there is a qualified privilege which excuses it. Free speech and free press are an established part of our democratic institutions, but both are limited by the law of slander and libel. By word and by pen the official record and pronouncements of a public man may be discussed and criticised, condemned and even vituperated, but the facts cannot be perverted with impunity. Several of the Florida cases above cited were between public officers and newspapers. An earlier one is Jones Varnum and Co. v. Townsend, 21 Fla. 431. See also Nevada State Journal Co. v. Henderson, 294 Fed. 60. But we need not at present further discuss this asserted privilege because the complaint alleges malice in fact, and privilege is never an effective cloak for malice. Abraham v. Baldwin, 52 Fla. 151, 42 So. 591; Coogler v. Rhodes, 38 Fla. 240, 21 So. 109. This allegation is supported, too, by the alleged fact that attention was called to the falsity of the intended publication but it was proceeded with. Also under the Florida statute notice of the intended suit was given so that a retraction might be made to limit damages to actual loss, if any, but no retraction was made. See Metropolis v. Croasdell, supra. Privilege and want of malice should await final decision on the trial.

The judgment is reversed and the cause is remanded for further consistent proceedings.

REVERSED.